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IN THE

Supreme Court of the United States

OCTOBER TERM, 197__

No. 76-1723

KERMIT G. HEISE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF CALIFORNIA COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT DIVISION ONE

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PETITION FOR A WRIT OF CERTIORARI
TO THE STATE OF CALIFORNIA
COURT OF APPEAL
FOR THE FOURTH APPELLATE DIVISION
DIVISION ONE

Petitioner prays that a writ of certiorari issue to review the judgment of the State of California, Court of Appeal for the Fourth Appellate District, Division One, entered in the above-entitled case on March 9, 1977.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the Appellate Department of the Superior Court of California in and for the County of San Diego is unreported and is printed in

Appendix A, hereto, infra, p. 11. The decision of the State of California Court of Appeal, Fourth Appellate District, Division One is unreported and is printed in Appendix A, hereto, infra, p. 14.

JURISDICTION

The judgment of the Appellate Department of the Superior Court of California in and for the County of San Diego, was entered February 11, 1977, affirming petitioner's conviction dated December 29, 1975. The State of California Court of Appeal, Fourth Appellate District, Division One denied a timely request to transfer on certification on March 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Whether denial of petitioner's motion to discover the contents of the prosecutor's jury book compiled from personal conversations between jurors and prosecutors was a denial of petitioner's right to fundamental fairness and an impartial trial.

Whether denial of voir dire posed by petitioner's counsel regarding extra judicial communications between prospective jurors and prosecutor was a denial of petitioner's right to fundamental fairness and impartial trial.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is Sixth Amendment which states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On October 21, 1975, a criminal complaint was filed against petitioner charging him with driving under the influence of alcohol, a misdemeanor violation of the state vehicle code.

Trial was scheduled in the El Cajon Judicial District of the County of San Diego. This is a small district of five (5) municipal court departments. Members of the jury panel must serve for approximately 45 days. The district office of the District Attorney is staffed by less than ten (10) deputy district attorneys. As a result of the small number of courts and district attorneys and the length of jury service, jurors quite often were impaneled on different cases with the same deputy district attorney.

On December 22, 1975, petitioner, through his counsel, made an oral motion

in the trial court for discovery of the district attorney's jury book. It was at this point that the federal question regarding petitioner's right to discovery of said book under the concepts of his Sixth Amendment right to an impartial trial and fundamental fairness was first raised. Petitioner's motion for said discovery was denied without a recorded opinion of the trial court.

The subject jury book for which petitioner made his discovery motion is a notebook containing information on each member of the current jury panel. For each juror, the jury book will generally indicate the trials on which the juror has sat and the verdicts reached. Information learned during voir dire in prior cases is also recorded. The jury book may also contain any information which a deputy district attorney has obtained by talking with the jurors after the verdict in prior cases has been returned. This recorded information typically includes observation of the jurors' attitudes as well as substantive facts communicated to the deputy district attorney by the jurors.

On December 23, 1975, the case herein came on for trial. During voir dire petitioner's counsel attempted to ask the prospective jurors the following questions:

> "Have you ever had conversation with a Deputy District Attorney about a case on which you sat as a juror?"

The trial court sustained the deputy district attorney's objections to this question. It was at this point in the trial proceedings that the federal question con-

cerning petitioner's right to voir dire as an integral part of his Sixth Amendment right to an impartial trial was raised.

On December 29, 1975, the jury returned a verdict finding the petitioner guilty as charged.

Petitioner subsequently appealled to the Appellate Department of the Superior Court of the County of San Diego asserting reversible error by the trial court in both denying his motion for discovery of the prosecutor's jury book and sustaining the prosecutor's objection to the above stated question on voir dire. Said court upheld the conviction by finding that the trial court did not err in denying petitioner's discovery motion (Appendix A, page 2, lines 22 and 23) and while it was error to deny petitioner's question on voir dire, said error was not reversible (Appendix A, page 2, lines 12 through 21).

On February 16, 1977, petitioner applied to the State of California Court of Appeal, Fourth Appellate District, Division One for certification by said Court of the instant case to itself. Said application was denied (Appendix A, page 4). Denial of petitioner's application for certification to the Court of Appeal extinguishes petitioner's right to appeal an action originating in the municipal court. No appeal to the California State Supreme Court is permitted. It is for this reason that petitioner requests the writ of certiorari be directed to the Court of Appeal.

REASONS FOR GRANTING THE WRIT

1. The decisions of the Court below regarding discovery of the prosecutor's jury book conflict in principle with the decision in Dennis v. United States, 384 US, 855, 870 (1966) wherein this Court stated there is:

> " . . . [a] growing realization that disclosure, rather than suppression, of a relevant material ordinarily promotes the proper administration of criminal justice."

The "proper administration of criminal justice" must necessarily include protection of a criminal defendant's Sixth Amendment right to an impartial trial. The compilation and use of a jury book by the prosecutor without the right of discovery for defendants denies defendants the right to such an impartial trial by giving the prosecutor a significant advantage in jury selection.

The composition of prior juries, the verdicts, and times of deliberation are public records. The post verdict communications between jurors and prosecutors, however, are not public records. It is in these conversations that the prosecutor can gain an insight into a juror's thinking during deliberations, into what evidence or argument was persuasive to that juror in prior deliberations. Of greater importance, these conversations could reveal a pro prosecution or pro defense bias which would not ordinarily be revealed by voir dire. Such a bias would be grounds for challenging a juror for cause but would go unnoticed by the defense

attorney but for the right to discover the data in the prosecutor's jury book which would reveal the bias.

The logistics of our present criminal defense bar prevents defense attorneys from obtaining the same jury information. Defense attorneys serving a particular judicial district work independently and in diverse geographic locations. They lack the organization and frequency of contacts which enables prosecutors to effectively maintain and use jury books.

A criminal defendant's right to an impartial trial, however, should not be denied merely because of the structure and nature of the defense bar. Here the prosecutor is in possession of material relevant to the selection of an impartial jury. The denial of defendant's right to an impartial trial could easily be rectified by allowing discovery of the prosecutor's jury book. This action would most assuredly promote the proper administration of criminal justice.

2. Clearly, the question regarding discovery of the prosecutor's jury book is important to the administration of criminal justice. It currently affects untold numbers of criminal defendants because maintenance of such jury books is common practice in prosecuting agencies. The question potentially touches all criminal defendants because every prosecuting agency has the ability to maintain such jury books.

3. The decision of the court below in finding that denial of voir dire of petitioner's counsel regarding conversa-

tions between prospective jurors and the prosecutor concerning prior verdicts was not reversible error conflicts in principle with the decisions of this Court.

This Court has consistently held that a criminal defendant's right to show the bias of a prospective juror and challenge said juror for cause is an integral part of said defendant's Sixth Amendment right to an impartial trial.

In Morford v. United States, 339 US 258, 259 (1950), this Court stated:

> "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial trial."

In Aldridge v. United States, 283 US 308, 313 (1931), this Court stated:

> "The right to examine jurors on voir dire as to the existence of a disqualifying state of mind, has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character." (Emphasis added.)

Petitioner asserts that a pro prosecution bias is a prejudice of a serious character which would disqualify a prospective juror. Even though the Court questioned the jurors on prior associations with the prosecutor, this was not enough to ensure discovery of or prove the existence of such a bias. The extra judicial conversations between prosecutor and jurors could easily plant or foster a pro prosecution bias. Petitioner's counsel should have been granted

the opportunity to prove such bias. Denial of this opportunity was a denial of petitioner's right to an impartial trial.

The significance of denying petitioner the right to prove bias was manifested by this Court in Aldridge v. United States, 283 US 308, 314 (1931):

> " . . . ; but if any [juror] was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit."

This Court in both Morford and Aldridge found that this denial of the defendant's right to an impartial trial was such a serious infringement to justify reversal of the convictions. Petitioner asserts that denial of the opportunity to show a pro prosecution bias also demands reversal of petitioner's conviction.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

William C. Stewart, Jr.
Counsel for Petitioner

Dated: June 1, 1977

APPENDIX

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

FILED FEB. 11, 1977

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

KERMIT G. HEISE,

Defendant and Appellant.

SUPERIOR COURT NO. CR 37498

MUNICIPAL COURT NO. T 399115
(El Cajon Judicial District)

OPINION

Appeal from a judgment of the Municipal Court, El Cajon Judicial District, County of San Diego, State of California. The Honorable Richard H. Bein, Judge. *Affirmed.*

Edwin L. Miller, Jr., District Attorney, by William J. Howatt, Jr., Deputy District Attorney, for plaintiff and respondent.

Linley, McDougal, Meloche & Murphy by Donald L. Meloche, for defendant and appellant.

THE COURT: Defendant's counsel was aware that in the judicial district he was trying this case, the same jury panels were used over a period of months, many times for trials with similar charges. Defense counsel also knew that the District Attorney's trial deputies frequently talked with jurors after the

trial of particular cases. In part using the results of such inquiries, the District Attorney's office prepared a Jury Book for their use during the selection of juries from these panels.

At the trial of the instant case, counsel for defendant tried to ask prospective jurors whether they had ever had a conversation with a Deputy District Attorney about a case on which they had sat as jurors. The District Attorney's objection to the question was sustained by the Court.

We are well aware of the discretion of the trial court to define the reasonableness of counsel's examination of prospective jurors. *People v. Crowe,* 8 Cal.3d 815 at page 828. Nevertheless under the circumstances of this trial, we believe the defendant's proposed question was indeed relevant to show bias, or to develop other grounds for a challenge for cause. The Court erred in refusing to permit counsel to ask the question. Appropriate follow-up questions arising from affirmative answers should then have been permitted. However, we do not believe we would be justified in holding the error is reversible error.

The Court did not err in refusing to give defendant the right to examine the District Attorney's Jury Book. *People v. Brawley,* 1 Cal.3d 277; *People v. Superior Court* (*Nelson*), 175 Cal.App.2d 830.

Affirmed.

BY THE COURT

s/s P.J.

s/s J.

s/s J.

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE, ETC., vs. KERMIT G. HEISE — 4 Crim. No. 8606; SUPERIOR COURT NO. CR 37498; Municipal Court No. T-399115.

BY THE COURT:

The transfer on certification is denied.

s/s

Presiding Justice

Copies to: Attorney General-SD
District Attorney-SD
Linley, McDougal, Meloche & Murphy-El Cajon
Superior Court-SD

4 Crim. No. 8606

SUPERIOR COURT NO. CR 37498
Municipal Court No. T-399115.

FILED MARCH 9, 1977